DOCUMENT RESUME

ED 169 569 CS 502 283

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TITLE The Role of Rhetoric in the Judicial Opinion: The Rhetoric of Boaventura De Sousa Santos.
PUB DATE Nov 78
NOTE 18p.; Paper presented at the Annual Meeting of the Speech Communication Association (64th, Minneapolis, Minnesota, November 1-4, 1978)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Communication (Thought Transfer); Conflict Resolution; *Discourse Analysis; Foreign Countries; Information Theory; Laws; *Legal Problems; Nonverbal Communication; *Persuasive Discourse; *Rhetoric; *Theories
IDENTIFIERS *Santos (Boaventura De Sousa)

ABSTRACT

Boaventura De Sousa Santos, a Brazilian law professor, appears to be the first legal scholar and theorist who works with rhetorical theories and who is accepted by the legal profession. Santos's major works have centered on the legal system of Pasargada, a Brazilian favela (squatter village) whose residents try to settle disputes outside the regular courts. In his writings (excerpts from which are included), Santos stresses the rhetorical aspects of law and the legal aspects of rhetoric, suggests three dimensions for the analysis of a dispute (direction, interpretation, and presentation), and discusses the areas of implicit and explicit discourse. He closely follows a classical model, and the concept of topoi--dialectical and rhetorical proofs that reason from generally accepted opinions and arguments--is central to his rhetorical system. He also considers nonverbal communication. With respect to Pasargada law, Santos develops topoi of ratification, repetition, retribution and restitution, moral justification, fairness, reasonableness, and cooperation. Santos's examination of the legal system in Pasargada has resulted in an important study in the application of rhetorical theory to real problems. As a classical rhetorician with a solid understanding of the problems of intercultural communication, Santos merits serious attention. (GT)

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THE ROLE OF RHETORIC IN THE JUDICIAL OPINION: THE RHETORIC OF BOAVENTURA DE SOUSA SANTOS

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Paper Presented at the 64th Annual Speech Communication Association Convention, Minneapolis, Minnesota, November 1-4, 1978

CS502283

The Role of Rhetoric in the Judicial Opinion: The Rhetoric of Boaventura De Sousa Santos

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I. Introduction

While such influential and pioneer American rhetorical theorists as James Winans, Herbert Wichelms, and Karl Wallace were interested in the relationship between rhetoric and law it was not until 1970[1] that the study of the interaction of these two disciplines became a focus for study and research in the United States. Since that time a number of articles have been published [2] and a sub-discipline, rhetoric, communication, and law has begun to emerge.

We now have articles, research papers, courses, and national and regional Communication and Law Committees. While a few American legal thoerists like Karl Llewellyn, Jerome Frank, and Walter Probert [3] have expressed some interest in rhetoric and communication theory, none have gone deeply into rhetoric or made any contribution to rhetorical theory. One European rhetorical theorist, Chaim Perelman [4] who was trained as a lawyer and later moved to rhetoric and philosophy has written about the entente between law and rhetoric and thus provided rhetoricians with a new and usfeful point of view. However, his work has not been embraced by legal scholars.

> So far as this kind of idea is offered to <u>lawyers</u> as an aid to finding justice, it seems to amount to telling them that what they need to do in order to decide problems of justice <u>is to act as if they were lawyers</u>. So that so far as Perelman has yet brought his theory of argumentation to bear upon his theory of justice, it seems only to have led him back to a main thesis of his

> initial work on justice... We are accordingly, at the end, back to where we started on the main point, namely at the material point of defining the class or rule within which equality should prevail. Rarely can there have been a more dismaying adventure in interdisciplinary helpfulness.[5]

Although the legal scholars and the legal profession have thus far failed to display any great interest or enthusiasim for Perelman's new rhetoric, communication scholars have written numerous articles[6] and disssertations discussing his ideas. The result of this set of circumstances has been that we lacked a legal scholar and theorist who was working with rhetorical theories and who was accepted by the legal profession.

It is the central thesis of this essay that this void has now been filled by Boventura De Sousa Santos. Santos is a Brazilian and a professor at the Law School of the University of Coimbra in Brazil. He graduated from Coimbra Law School in 1963 and after studying criminal law and the philosophy of law in West Germany he began to teach at the Law School from which he had graduated. In 1973 he earned a doctorate in law from Yale Law School where he wrote a doctoral thesis entitled "Law against Law: Legal Reasonong in Pasargada Law." In 1977 Santos published a monograph, "The Law of the Opressed: The Construction and Reproduction of Legality in Pasargada."[7] This essay which will attempt to sumarize Santos' rhetorical theories is based upon the latter publication. A bibliography of his published works relating to rhetorical theory will be found in the end notes.

Some knowledge of Pasargada may be helpful in understanding Santos' ideas. Pasargada is a favela or squatter village near Rio de Janeiro. It is one of the larger favelas containing more than 450 commerical establishments and several small factories, according to Santos.[8] Pasargada like similiar squatter settlements is built on land deemed unsuitable for development and no resident holds legal title to the land under his home or shop. In spite of this lack of clear conventional title, property is bought, sold, leased, and improved. Since favela residents wish as much as possible to avoid the regular courts or "law of the asphalt" as they term it, they try to settle their disputes through the quasi-official courts of the Residents Association (RA) where lawyers are seldom seen and most of the judges lack formal legal training. It is also useful to note that not all favela residents are poor, many are lower middle class, and a few are emerging capitalists or young professionals. Finally it should be noted that not all the poor peole live in favelas, but the residents are for the most part recent migrants to the larger cities from the poverty stricken areas of Brazil. Santos chose Pasargada for his study because of his interest in it and because he felt that its legal system would prove illuminating to such a study.

> The analysis of legal rhetoric has been left to legal philosophers, who have characteristically ignored the sociological context in which legal discourse operates... I will develop a conceptual and theoretical framework which will allow us to reconstruct scientifically the structure of legal reasoning and argumentation (that is, legal rhetoric.) I will analyze in depth the legal rhetoric

underlying dispute prevention and settlement in Pasargada as it is processed by the Residents Association. [9]

II. Santos' Theory of Rhetoric

In the classical tradition of rhetoric Santos begins by defining certain key terms:

> Law will be conceived as a body of regularized procedures and normative standards, considered justicable in a given group, which contributes to the creation and prevention of disputes and to their settlement through an argumentative discourse, whether or not coupled with force. [10]

This is of course a rhetorically centered definition of the concept of law, and it is characteristic of Santos to stress the rhetorical aspects of law as well as the legal aspects of rhetoric. He makes this relationship clear in the following excerpt:

> ...it is assumed that argumentative discourse (rhetoric) is the structural mode of actualization of law in the dispute settlement context. Rhetoric is argumentative discourse aimed at seeking adherence on the basis of persuasion. The backbone of such discourse is language, used as both a means of argumentation and as a magical form of language. Language, however, includes moments of nonlanguage, such as silences, implicit language, and even deeds. [11]

> Ever since the Greeks, Western thought has distinguished between two modes of reasoning(and of knowledge): apodictic reasoning, seeking to demonstrate necessary truths by means of analytical prrofs in the form of logical deduction or empirical experimentation; and the dialectical and rhetorical reasoning, seeking to deliberate about or argue for what is credible, reasonable, plausible, or probable by means of dialectical and rhetorical proofs that reason from generally accepted opinions and arguments (topoi).
>
> We know that legal reasoning in Greece and Rome was dialectical and rhetorical, so much so that general rhetoric was taught using the model of forensic rhetoric. Vico (1708) emphasizes that the old rhetorical method has been highly developed in judicial reasoning, and Curtius (1963) has shown how in the Middle Ages, students of rhetoric were trained through the discussion of fictitious legal cases. In modern times, however, a whole set of circumstances (including territorial unification, centralization of power, general discredit of rhetoric, growth of the legal profession, and economic development) has led to a new ideal of the law as scientific as a result of which, categories of rationality and generality have been substituted for the concepts of reasonableness and concreteness.[12]

Santos argues that both historically and structurally legal reasoning is and always has been dominated by rhetorical elements because there is always a background of uncertainty and pronability which cannot be removed by any deductive or apodictic method. the only solution, he asserts, is to employ the inventive art of finding points of view or "commonplaces" which, being widely

accepted, will help to fill the gaps, thus rendering the reasoning convincing and the conclusion acceptable. Even this early in this explication of Santos' rhetorical theories it should be self evident that Santos has chosen to follow closely a classical model and that he is greatly influenced by Aristotle and Perelman. Santos follows Aristotle's division of topoi into two classes, general and special:

> Special topoi belong to a specific domain of rhetoric, such as the law. Legal topoi may at times be very similiar to topoi used in politicsl or moral rhetoric, and in the context of some problems these may so intertwined that it becomes impossible to distinguish them.[13]

Santos suggests three dimensions for the analysis of a dispute, direction, interpretation, and presentation. He writes that direction refers to the overall orientation of the values by which disputed issues are to be resolved. When the parties and the judge agree on the direction to be followed they also tend to agree on what issues and facts are relevant. Interpretation refers to the evaluation of specific facts and issues as they are selected in accordance with the overall direction of the dispute process. It is through interpretation that some issues are clarified and others are obscured. It may become important to clarify one issue so that another issue may be thereby obscured. Presentation refers to the style of dispute processing and how it affects the way in which facts are offered and issues framed. An issue must be introcduced in a way that is appropriate to the situation.

The next area discussed by Santos which is of interest to the rhetorical theoriet is that of implicit and explicit discourse. He writes that implicit discourse is the fluid from which explicit discourse emerges and becomes meaningful. They are said to interect in two ways; in the early stages of the process, when the pre-understanding of the case, the topoi, and the valuations together contribute to a gradual approximation of facts and norms, implicit discourse excludes implausible solutions. As the dispute proceeds, facts and norms are are clarified, implicit discourse is redirected to making the selected solutions appear self-evident.

On the notion of explicitness he points out the concept must be applied to a whole range of intermediate communication processes, because statements that explicitly express one thing may implicitly symbolize another. He next introduces two other intermediate communication processes: signs and indices. Both have a double meaning; the face meaning and the evoked meaning. But while signs are intentionally used to evoke a certain meaning, indices evoke a meaning regardless of intent (Perelman is credited with the idea.) Signs are said to have a closed texture in two senses: the meanings they evoke are specific. and those meanings may be understandable only to certain interpreters. Indices, by contrast , have an open texture. Running through all of this is the constant use of dispute settlement and legal cases as examples. This is what one would expect in a law school doctoral thesis and from a lawyer-rhetorician, but it is worth mention that in the American literature on conflict resolution which seems synonymous with dispute processing there is simply no consideration of the relationship of conflict resolution to dispute processing and its attendant rhetoric.

It should be clear by now that the concept of topoi is central to Santos' rhetorical system. He explains that there are two kinds of arguments in most cases: arguments relating to form or procedure, and arguments relating to the substance or merits of the case. An argument relating to jurisdiction of a certain court or to the statute of limitations would be a procedural argument, while an argument that the accused was seen by witnesses committing the crime would be an argument on substance. On topoi Santos writes:

> Since topoi involve points of view that relate to questions of substance, it can be assumed that as formalism increases topic-rhetorical argumentation decreases. In a highly formalized legal system large portions of the dispute will be insulated from such legal argumentation, and thus rhetoric will appear in a recessive form... Modern legal systems derogate lack of uniformity as manipulation and arbitriness. From the point of view of a topic-rhetorical conception of the legal process, however, the lack of uniformity may be interpreted as teleogical faithfulness- a deeper understanding on the instrumental, subsidiary character of forms in relation to the substance or merits of the case...Forms and procedures may be used as arguments for the exclusion of implausible solutions...The official legal system under "modern" capitalism tends to be strict on formalism and loose on ethics...folk systems of legal formalism may emerge that are strict on ethics and loose on formalism...When a

> person expresses himself orally, his words are never fully divorced from their author...Written words, on the other hand create a gap between the author and his expression. My suspicion is that the topos of the written word has a predominantly legal outlook, while the topos of the spoken word is predominantly moral. [14]

Santos next turns his attention to what he calls "nonlanguage," which can be considered as the equivelent of non verbal communication. Under this heading he considers gestures, postures, flags, furniture bibles,crucifixes, pictures of leaders, files, written papers, gavels, typewriters, dress, space allocation, rituals of beginning and ending, and floor levels and visibility. But he states that these factors are subsidiary to language. He argues that communication and understanding depend on common language; without this legal reasoning becomes an absuridity.

> Except in the context of magic and ritual, words are not exchanged as words but rather as meanings. Thus people with different cultural backgrounds may speak different languages with the same words...Another hindrance to communication resides in the distinction between technical and everyday language. Professions develop their own languages because it is through professional languages that they are professions. The legal profession is no exception...Prolonged routine work with technical language may blind the professional to the common sense upon which such language is based; common sense may even appear as an absurdity to him. [15]

III. The Topoi of Pasargada Law

As has been pointed out in an earlier essay on Perelman's Rhetoric, topoi are needed for each major class of legal cases since cases differ in terms of the issues and sustantative arguments that may emerge. [16] Santos develops his theories around land and property cases in a single favela in Brazil, hence he makes no claims of universality. Despite this narrow base the topoi he develops seem general enough to be used in most land and property disputes and in many other situations. They are eight in number.

1. The topos of Ratification: these are arguments stemming from the existance of written documents, agreements, and contracts. In Pasargada the Presidente or RA Judge will prepare a typewritten agreement and the parties after reading it or having it read to them will sign it by means of a fingerprint(since many of them cannot read or write.) Future disputes may be settled by recourse to this document. [17]

2. The topos of Repetition: in writing a document the ideas will be expressed in many ways. Expressions of gratitude, love, tenderness, care, and respect will be repeated over and over again. This is done to ward off a challenge to the document. Far from being a product of clumsy drafting this is intended to stress the norms that create the intended legal consequence. [18]

3. The topos of Retribution and Restitution: this is a way in which the past and the future are connected. It is also an effort to employ moral discourse to meet a potential legal attack. [19]

4. The topos of Moral Justification: is based upon the norms of the society and compliance with them. It is an attempt to decide a dispute on the basis of what is just. It is used in conjunction with a legalistic or formalistic argument and thus serves to reinforce. Should the Presidente decide a dispute against the strict construction of a written agreement, he will fall back upon this topos to buttress the decision. [20]

5. The topos of Fairness: suggests a real or fictitious balance of rights and duties and approximates the model of mediation. But there is aslo a third category of false mediation where the rhetorical needs of the argument may lead the decision-maker to present a decision as a compromise when it actually grants the claims of a single party. Sometimes the real dispute and the processed dispute are kept separate to allow an economical settlement of both. [21]

6. The topos of Reasonableness: is invoked when a party has asserted an individual interest in opposition to the primacy of community (or neighborhood) interests. It is more difficult to apply than norms regulating conflict among individual interests. A person who easily defines his individual interest may not recognize a collective interest and even if he does he may find it difficult to determine how the two collide. People may watch someone doing something harmful to the interests of the community but if they are not directly affected the will not move a straw. Yet the notion is workable because peoples' lives are interdependent in a complex world and society. [22]

7. The topos of Intimidation: is the manipulation of various rituals and threats to bring about compliance. The most obvious is the threat of the power of the formal legal system and its sanctions. Others are distance and ventriloquism. The folder and copies of the laws were used as nonverbal cliches or legal fetishes whose infrequent appearance communicated a distinct note of impersonality and distance. Instead of explaining the law in his own words, the Presidente preferred to read the official text, another rhetorical device aimed at intensifying the impersonality of the legal argumentation. The state was speaking through the Presidente's mouth. Thus the reading as ritual evoked the myth of the all-powerful state.[23]

8. The topos of Cooperation: is the notion of working together for the common good so that a task that is too great for one person may be acomplished by the group. Mediation of disputes is common in Pasargada because the residents wish to avoid the notice of the formal legal system, hence they will accept the decision of the Presidente, because to do otherwise would require the intervention of other authority or no settlement at all.[24]

Santos makes no claim for the completeness of his topoi and the writer would take a similiar position in regard to his discussion of Santos' efforts. The importance of Santos' topoi is that he does demonstrate convincingly that the idea of topoi for modern dispute settlement and legal rhetoric does work. This then suggests that the concept of topoi is a viable one although it has been much neglected by modern rhetorical theorists.

IV. Conclusions

In this section two types of conclusions will be stated, those of Santos and those of the writer. Santos will speak first.

> Throughout history rhetoric has flourished in periods when social and political power were relatively widely distributed among the members of the relevant community. The repressive component of law, by contrast, first came to dominate in situations where the legal system was used to pacify ocupied countries defeated in war...
>
> Concentration of power brings with it control over language and silence, which undermines the collectivization of language and silence upon which the free flow of rhetorical argumentation is based. Rhetoric is inherently anarchic for it tends to subvert preconceived formal schemes of interaction (including language and silence) allowing free reign to fantasy and imagination... The key concept in rhetoric is the "relevant community" or "relevant audience." However widely shared, the power is exercised against someone: the irrelevant community. In the Athens of ancient Greece slaves were not part of the relevant community. Consequently the law, dominated by legal rhetoric, did not apply to them... This means that a truly democratic legal order inside the relevant community may coexist with (and indeed be based on) the tyranical oppression of the irrelevant community.
>
> Although the law has historically reflected and reproduced social processes of exclusion upon which social integration develops, the focus on legal rhetoric- and here lies its socio-historical importance for the analysis of the law- leads us to distinguish among the different forms of social exclusion. [25]

It should be kept in mind that Santos did not set out to write a comprehensive and systematic theory of rhetoric. Rather he had the intention in mind of examining the legal system in Pasargada. What emerged is a fascinating study in the application of rhetorical theory to the problems of real people in a real world. The application of rhetorical theory to the solution of legal problems is not a new concept, but is in the tradition of Aristotle, Cicero, and Quintillian, and others.

As a teacher of law in a society where free expression is somewhat restricted, Santos bears a more than superficial resemblance to Quintillian. And perhaps the analogy will be further developed if Santos, again like Quintillian, decides to turn his attention to a systematic examination of rhetorical theory. In so far as he has gone, Santos devotes his efforts mainly to invention, and especially the concept of topoi, although he does comment briefly on such matters as arrangement, style, language, and delivery.

Santos, then, is a classical rhetorician writing in the 1970's who is conversant with twentieth century social science and jurisprudence, as well as the ancient and modern traditions of rhetoric. To this must also be added his understanding of communication as a process and his education in Brazil, West Germany, and the United States. It is not surprising under the circumstances that Santos indicates a solid understanding of the problems of intercultural communication. Unlike Perelman, who must be translated into English from his native French, Santos has published in Portuguese, German, and English. Santos received his doctorate from Yale in 1973, he is in the early stages of his career. The least we can say is that he merits our serious and intensive study.

Footnotes

[1] Malthon M. Anapol, "Rhetoric and Law: An Overview," Today's Speech, 18, No. 4, (Fall, 1970.)

[2] See such articles as: Eve Levin-Epstein, "Legal Communication: Classical and Contemporary Conceptions," Encoder, 5, No. 1, (Fall 1977); Don Abbott, "The Jurisprudential Analogy: Argumentation and the New Rhetoric," Central States Speech Journal, 25, No. 1, (Spring 1974); Richard E, Crable, "Models of Argumentation and Judicial Judgement," Journal of the American Forensic Association, 12, No. 3 (Winter 1976); Stephen L. Wasby, Anthony D'Amato, and Rosemary Metrailer, "The Functions of Oral Argument in the U.S. Supreme Court," Quarterly Journal of Speech, 62, No. 4 (December 1976); and Glen E. Mills, "Legal Argumentation: Research and Teaching," Western Speech Communication, 30, No. 2 (Spring 1976.)

[3] Jerome Frank, Courts on Trial, (Princeton: Princeton University Press, 1946.)
Karl N. Llewellyn,"A Realistic Jurisprudence- the Next Step," (30 Columbia Law Review 431, 1930.)
Walter L. Probert, Law, Language and Communication, (Springfield, Ill: C.C. Thomas, 1972.)

[4] Chaim Perelman and L. Olbrechts-Tyteca, The New Rhetoric, (South Bend: Notre Dame Univ. Press, 1969.)

[5] Julius Stone, Legal System and Lawyers' Reasonings, (Stanford: Stanford Univ. Press, 1964.)

[6] Ray D. Dearin, The Philosophical Basis of Chaim Perelman's Theory of Rhetoric," Quarterly Journal of Speech, 50, No. 3 (October 1969) and Malthon M. Anapol, "Perelman as a Legal Rhetorician," TheoRhet, 3, No. 2 (December 1970.)

[7] Boaventura DeSousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada," Law & Society Review, 12, No.1 (Fall 1977) pp. 5-126.

[8] Santos, pp. 107-109.

[9] Santos, p.8.

[10] Santos, p. 10.

[11] Santos, p. 14.

[12] Santos, p. 16.

[13] Santos, pp. 27-29.

[14] Santos, pp. 30-31.

[15] Santos, p. 32.

[16] Anapol, "Pereiman as a Legal Rhetorician."

[17] Santos, pp. 45-47.

[18] Santos, p. 56.

[19] Santos, p. 57.

[20] Santos, p. 62.

[21] Santos, pp. 68-74.

[22] Santos, pp. 82-84.

[23] Santos, pp. 82-86.

[24] Santos, pp. 86-92.

[25] Santos, p. 99.

Related Articles by Boaventura De Sousa Santos

"La Loi Contre la Loi," Espirit, 41, No. 7-8, (1973.)

Law Against Law: Legal Reasoning in Pasargada Law, (Cuernavaca: Intercultural Center for Documentation, 1976.)

"Law and Revolution in Portugal: The Experiences of Popular Justice after the 25th of April, 1974." Presented at the Fourth Conference of the European Group for the Study of Deviance and Social Control, Vienna, 1976.